To be submitted by:
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Court of Appeals Index No. APL-2018-00143
Third Department No.525233

COURT OF APPEALS
STATE OF NEW YORK

LUIS A. VEGA,

Respondent

-against-

POSTMATES, INC.

Respondent

-and-

COMMISSIONER OF LABOR

Appellant

BRIEF FOR AMICI CURIAE: THE LEGAL AID SOCIETY, LEGAL SERVICES NYC, NATIONAL EMPLOYMENT LAW PROJECT, LEGAL SERVICES OF CENTRAL NEW YORK, INC., NELA/NY, AND THE NEW YORK TAXI WORKERS ALLIANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), amici curiae hereby disclose that they do not have any corporate subsidiaries or affiliates except as follows: *amicus* The New York Taxi Workers Alliance (NYTWA) is an affiliate of the National Taxi Workers Alliance (NTWA), which is an affiliate of the AFL-CIO and the International Transport Workers Federation; amicus NELA/NY is the New York State affiliate of the National Employment Lawyers Association; amicus Legal Services of Central New York, Inc. has an interlocking Board of Directors with the Legal Aid Society of Mid New York, Inc.

STATEMENT OF INTEREST OF AMICI CURIAE

The Legal Aid Society of New York Statement of Interest

The Legal Aid Society is the oldest and largest provider of legal assistance to low-income families and individuals in the United States. The Society's Civil Practice operates trial offices in all five boroughs of New York City providing comprehensive legal assistance in civil areas of primary concern to low-income clients. The Society's Employment Law Unit represents low-wage workers in employment-related matters and has challenged the misclassification of workers as independent contractors in unemployment insurance cases in various industries.

Legal Services of Central New York Statement of Interest

Legal Services of Central New York, Inc. (LSCNY) is a Section 501(c)(3) non-profit law firm serving the civil legal needs of low-income families and individuals, as well as underserved populations and people with special needs, in thirteen counties in central New York for 53 years. Specifically, LSCNY's work includes representing people with employment discrimination, wage and hour, equal pay, wrongful termination, re-entry, and family and medical leave matters.

Legal Services NYC Statement of Interest

Legal Services NYC ("LSNYC"), a non-profit legal services provider, is the largest provider of free civil legal services in the country, with 600 staff serving over 100,000 low-income New Yorkers annually throughout the five boroughs.

LSNYC is dedicated to fighting poverty by providing legal services to help low-income New Yorkers meet basic needs, including for income and economic security. As part of its advocacy for workers' rights and benefits, LSNYC provides representation to workers who have been improperly classified as independent contractors rather than employees by their employers.

National Employment Law Project Statement of Interest

The National Employment Law Project (NELP) is a non-profit legal organization based in New York City with 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all workers, and especially the most vulnerable ones, receive the full protection of labor laws, and that employers are not rewarded for skirting those basic rights. NELP has litigated directly and participated as amicus in numerous cases addressing the issue of employment relationships and independent contractors, including misclassification by companies in the so-called "gig economy," under federal and state labor standards, including unemployment insurance. NELP has a strong interest in this case because of the impacts of misclassification of low-wage workers for technology application (app)-based companies.

NELA/NY Statement of Interest

NELA/NY is the New York affiliate of the National Employment Lawyers Association ("NELA"), a national bar association dedicated to the vindication of the rights of individual employees. NELA is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 4000 member attorneys and 69 state and local affiliates who focus their expertise on employee compensation and benefits, employment discrimination, and other issues arising out of the employment relationship. NELA/NY has more than 350 members and is one of NELA's largest affiliates. NELA/NY is dedicated to advancing the rights of individual employees to work in an environment that is free of discrimination, harassment, and retaliation, and where individuals are classified and paid lawfully. Our members advance these goals through representation of employees who have been victims of, among other things, misclassification, discrimination and retaliation. NELA/NY has filed numerous amicus briefs in New York State and Federal Courts. The aim of this participation has been to highlight the practical effects of legal decisions on the lives of working people.

New York Taxi Workers Alliance Statement of Interest

The New York Taxi Workers Alliance (NYTWA) is a membership-based, non-profit organization which was founded in 1998 with the express purpose of seeking to improve the lives and working conditions of professional taxi and for-

hire vehicle (FHV) drivers. While the NYTWA had previously served mostly yellow-cab drivers, with the recent growth of app-based FHV services such as Uber and Lyft, drivers for app-based FHV services now make up roughly half of NYTWA's 21,000 members. The NYTWA has supported its members' litigation to challenge their misclassification by Uber, including challenges to their misclassification under the New York Unemployment Insurance Law. The NYTWA has a strong interest in this case because the provision of unemployment benefits to NYTWA members in the app-based FHV industry provides a crucial protection to workers who have been subject to high levels of arbitrary and unexplained termination, or often paid wages insufficient to support a minimum standard of living.

SUMMARY OF THE ARGUMENT

This case presents one of many examples of misclassification of workers as part of a business model that seeks to evade the obligations of unemployment insurance ("UI") and other labor protections for workers who are not truly in business for themselves. The misclassification of delivery service workers, whether they obtain their work through online applications ("apps") or more traditional means, is an increasingly common business model of firms seeking to externalize the costs of unemployment to workers and to the public, in opposition to the goals of the UI law. Independent contractor misclassification hurts

vulnerable low-wage workers. It also harms law-abiding businesses that cannot compete with companies that skirt the requirements of payroll taxes and do not provide social insurance. Additionally, independent contractor misclassification hurts public coffers when companies do not pay required UI, workers' compensation, and payroll withholdings.

In response to such employer conduct, this Court should return to its own precedent of applying a full common-law test, as found in the Restatement (Second) of Agency ("RSA"), to determine whether workers are truly independent contractors or employees. Instead of relying exclusively on an analysis of who controls the means of work, a review of all of the common-law factors yields a more accurate answer as to whether workers are truly in business for themselves and serves the statute's purposes more faithfully.

A more complete analysis of control factors would prevent reliance on the mere appearance of worker independence. While app-based firms such as Postmates grant varying degrees of flexibility to their workforce, they still unilaterally dictate key terms and conditions of work, for example, by identifying the customers and setting the fees they are charged, by dictating the rate of pay to the workers, and by setting the rules for the workers' participation in this entire exchange. It is common for app-based firms to grant their workforces

circumscribed forms of flexibility. At the same time, they reserve the right to change the rules of flexibility unilaterally and at any time.

The reality is that Postmates' workforce is not in business for itself. Postmates' couriers perform the central services Postmates sells to its customers and couriers do not set prices or pass on costs as regular small businesspersons do. The decision of the UI Appeal Board ("Board") should be affirmed.

ARGUMENT

I. SO-CALLED "GIG" COMPANIES LIKE POSTMATES SQUEEZE THEIR WORKERS AND HURT LAW-ABIDING EMPLOYERS AND PUBLIC COFFERS.

A. Independent contractor misclassification of app-based workers poses an increasing threat to New York's workforce.

Companies like Postmates, Uber, and Lyft "use internet-based technology platforms . . . to coordinate and manage on-demand piecework in a variety of service industries, from taxi to food delivery to domestic work." Maya Pinto et al., *Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know It*, National Employment Law Project (Apr. 2, 2019), https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk-4-2-19.pdf. Companies in this so-called "gig economy" have borrowed their misclassification business model from sectors like construction, trucking, and delivery, in which many businesses are structured to evade fundamental labor protections. Professor David Weil describes how companies disaggregate the labor-intensive parts of their business, either to another

labor broker or, as in this case, to individual workers. *See,* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014). By calling their workers "independent contractors," companies create confusion about who is responsible for working conditions and standards and who is covered by the law.

Independent contractor misclassification is a calculated business decision; employers who misclassify workers can lower their payroll costs by up to 30%. Catherine Ruckelshaus and Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (2017), http://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries- update-2017. As the United States Government Accountability Office ("GAO") has concluded, "employers have economic incentives to misclassify employees." U.S. GAO, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification,* GAO-06-656, 25 (2006), at 25, https://www.gao.gov/new.items/d06656.pdf. The problem of misclassification represents a significant gap in labor and employment law. Misclassification creates a market environment where workers have less power, long-established norms have less influence, and companies set disadvantageous terms. *See,* David

Weil, *Enforcing Labor Standards in Fissured Workplaces: The US Experience*, THE ECONOMIC AND LABOR RELATIONS REVIEW v. 22, no. 2, 36–37 (July 2011).

While economists have struggled to calculate the number of workers engaged in app-based work, 2017 data from the Bureau of Labor Statistics (BLS) showed "electronically mediated workers" accounted for one percent of the nation's workforce, totaling 1.6 million workers. Bureau of Labor Statistics, U.S. Dept. of Labor, *Highlights of the May 2017 Data on Electronically Mediated Work* (May 2017), https://www.bls.gov/cps/electronically-mediated-employment.htm. In addition, New York may have a higher rate than the national average. A recent J.P. Morgan study found that 1.8% of its New York account holders were engaged in labor in the online platform economy in October, 2017. *The Online Platform Economy in 2018: Drivers, Workers, Sellers and Lessors*, JP Morgan Chase & Co. Institute, at 55, https://www.jpmorganchase.com/corporate/institute/document/institute-ope-2018.pdf. If this percentage is representative of the New York workforce at large, roughly 165,600 New Yorkers are engaged in app-based work. [1]

A 2018 study found that if Uber classified its drivers as employees, it would be the single largest private-sector employer in New York City. James A.

[1] There are nearly 9.2 million workers in New York. Bureau of Labor Statistics, U.S. Dept. of Labor, *Economy at a Glance, New York* (June 2019), https://www.bls.gov/regions/new-york-new-jersey/new_york.htm#eag_ny.f.3.

Parrott & Michael Reich, *An Earnings Standard for New York City's App-Based Drivers, Report for the New York City Taxi and Limousine Comm'n*, at 69 (July 2018), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3aaa0e2e72ca74079142/1530542764109/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf. The BLS study also found that a much larger proportion of workers in the app-based economy—37%—report being classified as independent contractors, compared to 6.9% of workers overall. *Electronically Mediated Work: New Questions in the Contingent Worker* Survey, Bureau of Labor Statistics, Monthly Labor Review (Sept. 2018), https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm.

While the absolute number of workers is relatively small, if unchecked, the rush to misclassify workers as independent contractors will increase. According to a confidential IPO filing from February 2019, Postmates employs 240,000 couriers in North America and reaches 70% of U.S. households. *Food Delivery Pioneer Postmates is said to file to go Public*, BLOOMBERG, Feb. 7, 2019, https://www.bloomberg.com/news/articles/2019-02-07/food-delivery-pioneer-postmates-is-said-to-file-to-go-public. In just thirty weeks between 2014 and 2015, Postmates deliveries increased from 500,000 to 1.5 million. Alex Wilhelm,

Analyzing Postmates' Growth, TECHCRUNCH, Mar. 4, 2015, http://techcrunch.com/2015/03/04/analyzingpostmates-growth/. As these companies grow and seek additional funding, pressure builds to adopt an independent contractor business model to shed labor costs.

App-based companies are also asserting themselves in the legislative arena to legalize their business model. *See*, *supra*, *Rights at Risk.* Many of the biggest online-platform companies seek to exempt themselves from workplace laws governing pay and other benefits. *Id.* For example, Uber and Handy's chief political strategist, Bradley Tusk, asked "[w]hat is ultimately a better business decision? To try to change the law in a way that you think works for your platform, or to make sure your platform fits into the existing law?" Lydia DePillis, *For gig economy workers in these states, rights are at risk*, CNN Money, March 14, 2018, https://money.cnn.com/2018/03/14/news/economy/handy-gig-economy-workers/index.html.

B. Independent contractors lose out on workplace protections and often work in low-wage jobs.

Like most misclassified workers, Postmates couriers earn low wages and receive no health or fringe benefits.[2] Misclassification excludes workers from the right to organize and bargain collectively, minimum wage and overtime

[2] The Commissioner of Labor noted that Postmates couriers are not reimbursed for travel expenses or provided with fringe benefits such as workers compensation, uniforms, telephones or business cards. Commissioner Brief and Appendix, 9-10.

protections, access to UI, workers' compensation, employer contributions to Social Security, anti-harassment and discrimination protections, and the chance to access retirement savings plans. *See*, *Rights at Risk.*

App-based companies laud flexibility as a boon for workers, but that flexibility is illusory. In reality, workers must work when customer demand is high to try to make ends meet. Workers risk being fired or "deactivated" if they fail to accept enough jobs. *See*, Rebecca Smith, *Flexibility in the On-Demand Economy*, NELP (June 2016), https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Flexibility-On-Demand-Economy.pdf. Others, like Postmates, rely on the availability of a sufficiently large pool of workers who need these jobs. If labor market conditions tighten so that fewer workers are willing to take these jobs, companies are likely to require workers to be on-call at risk of losing their job. Because the work is sporadic and piecemeal, workers are often forced to accept jobs from multiple companies. Also, because pay rates are low, these workers may be forced to work long hours. In a 2015 survey, forty percent of "gig workers" reported working for two or more companies in a week, and fourteen percent reported working for three or more. Request for Startups, *RFS 1099 Economy Report* (2015) at 55, http://www.requestsforstartups.com/survey. In the same survey, nearly fifty percent of app-based workers reported they struggled to find enough work to pay the bills. *Id.* Thus, Postmates' ability to rely on constantly

available labor partly results from them and other "gig" companies underpaying their workers, thus creating additional demand for app-based work.

According to reports from delivery workers, Postmates pays pennies for its workers to wait and DoorDash pays nothing. Lisa Fickenscher, *Horror stories about DoorDash delivery workers are piling up*, NEW YORK POST, July 21, 2019, https://nypost.com/2019/07/21/horror-stories-mount-about-delivery-workers/. In some instances, workers will do deliveries for hours and only earn the minimum wage because of low tips and long wait times. Clint Rainey, *A Night in the Life of a Postmates Delivery Worker*, GRUB STREET, Feb. 25, 2019, http://www.grubstreet.com/2019/02/one-night-postmates-delivery-worker.html. One worker reported that Postmates pays a flat fee of $4 per order, plus 10 cents for every minute waiting for food, and that the worker on average only received tips on 27% of deliveries. *Id.* In May 2019, Postmates unilaterally changed its minimum job guarantee policy and its base pay rates for deliveries. Megan Rose Dickey, *Postmates Workers Want Minimum Delivery Guarantees and At Least $15 Per Hour*, TECHCRUNCH, May 20, 2019, https://techcrunch.com/2019/05/20/postmates-workers-want-minimum-delivery-guarantees-and-at-least-15-per-hour/. Under the new scheme, after factoring in expenses, one Postmates courier in California made as little as $5.29 per hour. *Id.* Misclassification has a disproportionate effect on app-based workers because of

the precarious nature of work in the "gig" economy. A BLS contingent worker study found that "gig" work was more unstable than other types of work, as 8.7 percent of the workers surveyed reported that they did not expect their job to last beyond a year, compared to 3.8 percent of workers overall. The same study reported that app-based work is the main occupation for 72 percent of workers in this field, increasing the harm of being fired or "deactivated" without notice. Bureau of Labor Statistics, https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm.

Unemployment insurance is especially important to these workers. App-based workers may experience involuntary separation or have "good cause" for leaving their jobs that would entitle them to UI. Postmates workers can be "deactivated" from the platform without notice due to lateness or low customer ratings.[3] Drastic reductions in the pay formula give app-based workers good cause to leave such work and claim UI while they seek work elsewhere. The chronic income instability of piecemeal work across multiple platforms makes app-based workers exactly the type of workers most in need of UI.

[3] Postmates terminates couriers for reasons such as negative customer feedback and fraudulent activity and did so by blocking couriers from "logging on to the platform." Commissioner's Brief and Appendix (A. 36, 41, 74, 117).

C. Misclassification of app-based workers harms law-abiding employers and reduces federal and state revenues, including UI receipts.

By misclassifying workers, companies can avoid payroll taxes that fund vital social insurance programs and hurt state and federal coffers with far-reaching impacts beyond those who work in the "gig" economy.

App-based workers are doing tasks that were formerly completed by full-time workers. This puts pressure on businesses that employ workers in these fields to shed labor costs to remain competitive. Rampant misclassification creates a "race to the bottom" whereby firms can only profit through following these non-compliant business models. *See* WEIL, THE FISSURED WORKPLACE, 139-41. In order to compete for clients, companies cut costs by using similar labor force strategies, making these strategies the industry norm that workers are required to accept. *See* Ruckelshaus and Gao. The market price for these services is pushed lower, until traditional employers cannot compete. *See* WEIL, THE FISSURED WORKPLACE, 142.

The states and the federal government lose billions when employers misclassify workers. A 2017 review of twenty state studies focused on independent contractor misclassification, generally, demonstrates the staggering scope of these abuses. Catherine Ruckelshaus and Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and*

State Treasuries, NELP (Sept. 2017), https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf. Misclassification can be hard to detect, because very few companies are audited. Lalith De Silva, et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, Planmatics, Inc., Prepared for the US Department of Labor Employment and Training Administration (2000), http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf. A 2000 study commissioned by the Department of Labor found that of those businesses audited, between ten and thirty percent misclassified workers. *Id.*, at iii. According to a 2009 report by the Treasury Inspector General for Tax Administration, misclassification contributed to a $54 billion underreporting of employment tax, and losses of $15 billion in unpaid Federal Insurance Contribution Act (FICA) and UI taxes. Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, Agency-Wide Employment Tax Program and Better Data Are Needed* (Feb. 4, 2009), at 8, http://www.treas.gov/tigta/auditreports/2009reports/200930035fr.pdf.

Misclassification harms state funding for safety net programs. In 2014 alone, the New York Joint Enforcement Taskforce on Employment Misclassification (JETF) identified nearly 26,000 cases of misclassification resulting in nearly $316 million in unreported wages. New York DOL, *Annual*

Report of the Joint Enforcement Task Force on Employee Misclassification (Feb. 1, 2015), at 2, https://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2015.pdf. The JETF assessed $8.8 million in UI contributions, and the New York DOL discovered another $7.2 million in unpaid UI contributions in New York. *Id*, at 2-3. Between 2007 and 2014, the JETF identified 140,000 instances of employee misclassification and $2.1 billion in unreported wages. *Id*, at 3. If the audit data from the state is extrapolated, the number of misclassified workers in New York is 704,785, roughly ten percent of the workforce. Linda H. Donahue, James Ryan Lamare, & Fred B. Kotler, *The Cost of Worker Misclassification in New York State*, Cornell University School of Industrial Labor Relations (Feb. 2007), at 2, http://digitalcommons.ilr.cornell.edu/reports/9/. Misclassification reduces revenue to New York's UI Trust Fund which undermines the fund's solvency. Only four states rank behind New York in terms of UI Trust Fund solvency. U.S. Department of Labor, Office of Unemployment Insurance, *State Unemployment Insurance Trust Fund Solvency Report 2019*, at 59 (Feb. 2019), https://oui.doleta.gov/unemploy/docs/trustFundSolvReport2019.pdf. New York's UI Trust Fund reserves to benefits cost ratio is currently 0.34, well below the Department of Labor's recommended ratio of 1. *Id.* at 40.

II. THE UI LAW MUST BE CONSTRUED IN A WAY THAT SERVES ITS STATUTORY PURPOSES AND HONORS THE FULL COMMON-LAW TEST.

A. Postmates' attempts to misclassify its workforce run counter to the purposes of the UI law.

The UI law must be construed in a way that serves the statutory purposes of: 1) providing short-term emergency benefits for workers who, rendering service to another's business, find themselves unemployed through no fault of their own; and 2) funding a social insurance program by allocating costs among employers, instead of allowing businesses to externalize costs to their workers and the broader tax base.

It is a basic tenet of statutory construction in New York that the court must consider the statutory purpose and the "mischief to be corrected" by the statute. *Nestor v. McDowell*, 81 N.Y.2d 410, 414 (1993). Likewise, it is well-settled that the UI law is "a remedial statute designed to protect the wage earner from the hazards of unemployment." *Matter of Ferrara*, 10 N.Y.2d 1, 8 (1961). In enacting the UI law, the New York State legislature intended to lighten the burden of "involuntary unemployment...which now so often falls with crushing force upon the unemployed worker and his family." NYLL § 501. Generally, a determination of coverage under the UI law considers the "relevant statutory language, design and *purpose*." *In re Claim of Gruber*, 89 N.Y.2d 225, 232 (1996) (Emphasis added). Because the UI law is "a remedial statute," it is the court's "solemn duty

to give [it] a liberal and a humanitarian interpretation." *Machinski v. Ford Motor Co.*, 277 A.D. 634 (3d Dept. 1951).

In addition to the individual relief UI provides workers, the program was designed to properly shift the financial burden of unemployment from the tax base to employers, specifically, and to stabilize the economy by maintaining workers' purchasing power during periods of temporary unemployment. In making employers, rather than all taxpayers, socialize the costs of unemployment, Congress noted that "[p]artial compensation during a relatively short period following employment ... is very properly to be regarded as a part of the legitimate costs of production." S. REP. NO. 74-268, at 12 (1935). Such compensation is intended to allow workers to continue purchasing essential goods and services, creating economic demand that sustains and creates jobs and prevents increased unemployment from snowballing into wider economic crisis. When employers avoid making UI contributions through employee misclassification, they break this self-sustaining cycle by reaping the benefits of stabilized purchasing power without contributing to the funds that make it possible.

The Court can meet its duty to honor the remedial and humanitarian purposes of the UI law while applying a common-law analysis of employee status. The Court should emphasize those factors most pertinent to the remedial purposes of the UI law. Where the mischiefs to be remedied are the potential for "crushing

poverty" facing wage earners who find themselves unemployed through no fault of their own, and an employer's attempts to externalize the costs of its layoffs and terminations, the Court's remedy must take into account factors which relate to the putative employer's control over the workers' continued employment or unemployment, and whether the workers are in business for themselves.

B. The common law analysis to be applied under the NYLL is broader and more probing than the characterization given by the Third Department.

The Third Department's decision in this case articulated only one factor to be used when determining employee status under the UI law: whether the "alleged employer exercises control over the results produced ... or the means used to achieve the results." *Matter of Vega*, 162 A.D.3d 1337, 1337 (3d Dept. 2018) (internal citations omitted). This standard provides an incomplete and skeletal approach to the common law's master-servant test, which is insufficient to assess work relationships in light of the statute's stated purposes. Such a reductive test spurns the Act's remedial purposes, creating a standard for employee status that is more restrictive than even age-old common law standards.[4] In demanding a level of detailed control that may not be found in the most unskilled jobs, the Third Department reads the UI law in a manner that will deny benefits to the most

[4] *See, e.g.*, 1 SHEARMAN AND REDFIELD ON NEGLIGENCE (6th Ed.) § 164, quoted in *In re Rheinwald*, 168 A.D. 425, 435-36 (3d Dept. 1915) (describing the true test of independent contractor status as looking not only to control, but emphasizing that a contractor works, "in pursuit of an independent business.")

vulnerable workers, in low-wage industries, performing the most unskilled work on an contingent basis.

1. The limited, single-factor test applied by the Third Department misstates the common law of agency and is insufficient to serve the purposes of the UI Law.

The single-factor control test applied by the Third Department is a formulation of the so-called "master-servant" test that traces its roots centuries back into tort litigation. *See*, Marc Linder, *Employed or Self-Employed? The Role and Content of the Legal Distinction: Dependent and Independent Contractors in Recent U.S. Labor Law: an Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*. 21 COMP. LAB. L. & POL'Y J. 187, 187 (1999). Accordingly, this test was designed to allocate tort liability between a worker and a putative employer. Rather than effectuating the purposes of the UI law to determine whether a worker should be left to bear the risks of no-fault unemployment, the single factor-control test serves a different purpose entirely.

Despite the Third Department's minimalist rendering of the standard, a complete common-law analysis is far broader and better serves the remedial purposes of the law. In one of this Court's earliest decisions concerning employee status under the UI law, this Court expressed that its analysis of employee status would be rooted in common law agency principles, and doubted the ability of the single-factor control test to define the inquiry into employment status. *See*, *In re*

Morton, 284 N.Y. 167, 173 (1940). The *Morton* court held that "the degree of control which must be reserved by the employer in order to create the employer-employee relationship cannot be stated in terms of mathematical precision, and *various aspects of the relationship may be considered in arriving at the conclusion in a particular case* (Restatement of the Law of Agency, §220)" *Id*, at 173 (emphasis added).

Since *Morton*, New York courts have repeatedly emphasized that employment status under the UI law is not to be determined by merely analyzing one factor, but by assessing all factors present in the employment relationship. *See, e.g., Schlicker v. W.R. Blake & Sons*, 55 A.D.2d 789, 790 (3d Dept. 1976) (eschewing a single-factor control analysis, and stating that "no single factor alone" determines employment status (internal citations omitted)); *In re Concourse Opthamology*, 60 N.Y.2d 734 (1986) (control factor deemphasized where the nature of the work does not lend itself to control); *see also, NLRB v. United Ins. Co.*, 390 U.S. 254, 258 (1968) (setting forth principles for determining employment status under the NLRA's common-law analysis, holding: "[A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles"). As indicated by *Morton*, the common-law statement of the "various factors" which the Courts have

repeatedly referenced, is found within the Restatement (Second) of Agency §220 ("RSA 2d").

In this way, the common law, as distilled by the Restatement and approved by this Court since *Morton*, provides a far more probing inquiry into whether workers are truly in business on their own or are performing services for another business that bears responsibility for workers and the public under the UI law. The factors set forth in the RSA 2d §220(2) are:

a. The extent of control which, by the agreement, the master *may exercise* over the details of the work;
b. Whether or not the one employed is engaged in a distinct occupation or business;
c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
d. The skill required in the particular occupation;
e. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
f. The length of time for which the person is employed;
g. The method of payment, whether by the time or by the job;
h. Whether or not the work is a part of the regular business of the employer;
i. Whether or not the parties believe they are creating the relation of master and servant; and
j. Whether the principal is or is not in business.

(Emphasis added.) By contrast, the single-factor control test applied by the Third Department incorporates only an incomplete approximation of the Restatement's first factor. Indeed, as discussed further below, the Third Department did not even

consider the control that Postmates retains, that is, "may exercise," even if not yet exercised.

An approach that considers the broader set of factors set forth in the Restatement is not only supported by *Morton*, but has been clearly articulated and applied by other states and agencies that determine employment status under a common-law analysis. *See, e.g.*, *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563, 566 (D.C. Cir. 2016), quoting *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (following a more comprehensive analysis that looks to all of the RSA 2d factors, and, additionally "looks to see whether the workers have a 'significant entrepreneurial opportunity for gain or loss'"). In *Corporate Express*, the Court of Appeals followed the NLRB in deemphasizing the focus on control over the manner in which the work is done to focus instead on "entrepreneurial opportunity." *Corporate Express*, at 780, *enforcing* 322 NLRB 1522 (2000) (Emphasizing that employee-drivers did not operate independent businesses, but rather performed an integral function of the employer's business). This analysis, while firmly rooted in the common law, seeks to emphasize in essence whether putative employees are actually in business for themselves. Applying this common law test, the NLRB's Office of the General Counsel found Postmates to be an employer for purposes or the National Labor Relations Act.

Postmates Inc., N.L.R.B. General Counsel Advice Memo, 13-CA-163079 (Sept. 19, 2016).

The single-factor test, as applied by the Third Department, is particularly unsuited to a meaningful, purpose-guided analysis of unskilled work such as that performed by Postmates couriers. *See* RSA 2d factors c & d. Notwithstanding substantial evidence of Postmates' control of various aspects of the work relationship, and the manner in which the work is to be done (*see*, Brief for the Appellant, Commissioner of Labor, at 27-38, 42-47, 51), Postmates couriers' labor is simply too unskilled to require extensive control over the means by which the work is to be done. The Third Department's search for more extensive control of the manner in which the work was to be done was misguided because the delivery of packages is unskilled labor which does not lend itself to detailed instruction. While Postmates exercised all meaningful control over the operation, as discussed in detail below, by confusing a job's simplicity and repetition for economic independence, the analysis of the Third Department derailed the statute from its remedial purposes.

The Third Department's single factor approach could render UI benefits inaccessible to workers performing the lowest skilled work and who have no independent means or business by which to support themselves. Such an outcome is repugnant to the purposes of the UI law and shifts the costs of these workers'

assistance from employers to the taxpayers. This is specifically the outcome that the legislature sought to avoid in creating the UI law. *See* NYLL § 501.

2. The more probing approach of the RSA 2d, §220 allows for a more meaningful analysis of unskilled work.

The complete common-law inquiry articulated in the RSA 2d is not only more probing than the standard used by the Third Department, but better serves the statutory purposes of the UI law. With a multi-factor test, certain factors may prove more meaningful, depending on the nature of the job.

California's Supreme Court provides an example of how a more comprehensive, common-law grounded approach can be applied in analyzing employee status for skilled and unskilled work alike. In determining employee status by applying a test that is largely rooted in the Restatement, that court rejected arguments that a lack of immediate control over cucumber sharefarmers' labor would deprive such workers of employee status. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341, 345 (1989). After noting the many ways in which the employer controlled other aspects of the work relationship, the court found that "[i]t thereby retains all necessary control over a job which can be done only one way." *Id.* Regarding the relative lack of control over the means by which such unskilled work was to be done, the court noted that "[i]t is the simplicity of the work, not the harvesters' superior expertise, which makes detailed supervision and discipline unnecessary." *Id*, at 357-58. Applying

the same common-law derived *Borello* test in the UI context, California courts have held that couriers similar to those employed by Postmates were employees, rejecting arguments that the failure to explicitly control "actual routes and speeds [couriers] chose when making deliveries denoted a lack of control." *Air Couriers Internat. v. Employment Development Dept.* 150 Cal. App. 4th 923, 937 (2007). Rather, the court emphasized that "the simplicity of the work (take this package from point A to point B) made detailed supervision, or control, unnecessary" and that the employer "retained all necessary control over the overall delivery operation." *Id.*

Along these lines, New York courts have long acknowledged that the control test becomes less relevant where the type of work does not lend itself to detailed control. In those cases, the reserved right to control is more important and courts ask can the company intervene and exercise control if needed to fix a problem? Control over the broader working relationship, and integration of an employee's services into the putative employer's business, among other factors, provide a more meaningful analysis when "the nature of services rendered ... precludes close control over the details of the work of the results produced." *In re Eastern Suffolk School of Music, Inc.* 91 A.D.2d 1123, 1123 (1983) (Affirming the UI Appeal Board's decision that part-time music teachers were employees), *leave denied*, 60 N.Y.2d 554 (1983). Autonomy over certain tasks "does not equate to such

independence" as to make a worker an independent contractor where "the nature of the services he performs simply do not lend themselves to constant supervision and control either of the details of his work or the results produced." *In re Claim of Curto*, 109 A.D.2d 938 (3d Dept. 1985); *see also Glielmi v. Netherland Dairy Co.*, 254 N.Y. 60, 63 (1930) (Cardozo, J.) (holding a commission-based milk salesman to be an employee for purposes of the Workmen's Compensation Act where "the [worker] has no discretion as to the manner of performance, *or none that is substantial*") (emphasis added). Indeed, it is for this reason that the Restatement notes the key significance of unskilled work in indicating employee status. RSA 2d §220(2)(d), and Comment *i*.

The Restatement itself notes that, depending on the individual facts, certain facts may be more or less relevant. Comment *d* to RSA 2d §220 gives the example of a full-time cook who is considered a servant (employee), despite the fact that the employer does not exercise control over the cooking. Under a strict interpretation of the single factor test laid out by the Third Department, however, such a cook would necessarily be an independent contractor, an outcome not contemplated by the common law. *See also*, *S.G. Borello*, at 350: "[T]he courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements."

3. The Court should apply the complete common law test with an emphasis on those factors that particularly aid in serving the statutory purposes of the UI law.

A more appropriate common-law test that serves the purposes of the UI law would, in line with *Morton*, determine employment status by analyzing all of the factors of the employment relationship through the RSA 2d.

Other states focus on Restatement factors that address whether workers are truly in business for themselves. For the purposes of their respective UI laws, twenty-five states use a version of the so-called "ABC test,"[5] which puts the onus on the hiring party to show not only lack of control but also that the worker is not performing the usual work of the business and that the worker is independently in business on their own. *See* RSA 2d factors b, h and j. Likewise, it is for this reason that since the UI law was first implemented, this state's courts have considered the "right to 'hire' and 'fire' to be of great importance" in determining employee status. *In re Scatola*, 257 A.D. 471, 473 (3d Dept. 1939), *aff'd* 282 N.Y. 689 (1940). It is the employer's power to terminate an employment relationship, and the concomitant responsibility for a worker's involuntary unemployment, that makes a worker's poverty the employer's financial responsibility through contributions to the UI fund.

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[5] *See* Rebecca Smith, *Washington State Considers ABC Test for Employee Status*, Jan. 28, 2019, https://www.nelp.org/blog/washington-state-considers-abc-test-employee-status/.

III. EVEN FOCUSING ON CONTROL, POSTMATES COURIERS ARE NOT INDEPENDENT CONTRACTORS, BUT EMPLOYEES.

Although misclassification through fissuring of the workplace is no longer new, app-based work presents new techniques for misclassification. As detailed above, assigning work through apps masks control and facilitates misclassification.

The primary way that employers justify the misclassification of app-based workers is by equating worker flexibility with genuine worker independence. However, these are not synonymous, especially where employers maintain and retain control over their workers. *See, e.g., In re Kelly*, 28 A.D.3d 1044 (3d Dept. 2006) (finding delivery workers to be employees, even where they had flexibility in terms of scheduling, rejecting and accepting assignments, and working for the employer's competitors).

Postmates' claim that its couriers, not Postmates, control the "means" by which deliveries are made is misleading. Rather, Postmates exercises or reserves its right to control the relationship with its couriers.

A. The flexibility provided to Postmates' couriers is exclusively under the control of Postmates.

What Postmates points to as control by its couriers over their work, *e.g.*, the right to refuse work and the right to work for other companies, is actually flexibility *unilaterally* granted by Postmates–and which Postmates can easily take away. A company controlling employees through rules that include elements of

flexibility still exercises control over its workers through those rules. The employer retains the power to modify or eliminate those rules at any point, based solely on its discretion.[6] Merely because Postmates grants couriers some level of flexibility does not mean that Postmates lacks control over their working conditions. Independent contractors, on the other hand, have the power to determine and negotiate their conditions of employment, which cannot be unilaterally changed by a hiring company.

Currently, Postmates relies on a large pool of unemployed and underemployed workers in the labor market to fulfill deliveries. However, if market conditions change, Postmates would likely change its terms and conditions with its couriers, for example, by demanding availability for certain shifts, changing the fees charged for deliveries and courier pay, or by requiring that they accept a minimum number of deliveries. In other words, Postmates reserves the ability to supervise and exercise control over the major aspects of the work being performed by its couriers, indicative of an employer-employee relationship. *See, e.g.*, *Matter of Kimberg*, 188 A.D.2d 781 (3d Dept. 1992) (finding employee status where the employer reserved the right to control and supervise major aspects of the employee's work).

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[6] E.g., Uber recently began exercising its control to schedule and limit the hours drivers in New York City can work, after years of permitting unlimited flexibility. *See*, Tina Bellon, *Uber to limit drivers' app access to comply with NYC regulation*, REUTERS, Sep. 16, 2019, https://www.reuters.com/article/us-uber-new-york/uber-to-limit-drivers-app-access-to-comply-with-nyc-regulation-idUSKBN1W12OV.

Furthermore, the ability of Postmates' couriers to work for competitors is also in no way inconsistent with an employer-employee relationship. For example, a line-cook in a fast-food restaurant can also work as a line cook at another fast-food restaurant, yet be an employee of both establishments. Working for two competitors is not an uncommon practice. Julia Beckhusen, *Multiple Jobholders in the United States: 2013*, U.S. Census Bureau: Employment (May 29, 2019), https://bit.ly/2XVYyl3. When working at each fast-food restaurant, the worker must abide by that fast-food restaurant's rules and policies. The situation described reflects a decision by the employer to permit that practice, not worker independence. Similarly here, Postmates' couriers must follow Postmates' rules and policies, regardless of whether they work for competitors. Meanwhile, Postmates could unilaterally decide to prohibit work for competitors should market conditions change.

B. Postmates workers are not truly in business for themselves.

Unlike true independent contractors, Postmates' couriers are not in business for themselves. Unlike businesspersons, Postmates' couriers do not own individualized delivery companies, do not solicit their own customers, and cannot set prices or pass on costs incurred to Postmates' customers. Instead, all of their work stems from Postmates. They rely on Postmates to send them tasks as dictated by Postmates' policies, and Postmates relies on couriers to perform pickups and

deliveries; the workers could not deliver without Postmates, and Postmates' business could not function without its couriers.

This Court has established precedent governing the classification of couriers as employees, particularly considering the unskilled nature of the work and the level of control exercised by employers. This Court has affirmed the employment status of couriers with similar conditions to those Postmates raises here, *e.g.*, workers setting their own schedules and being allowed to work simultaneously for competitors. *Matter of Rivera*, 69 N.Y.2d 679 (1986), *cert. denied*, 481 U.S. 1049 (1987), *inter alia*, *affirming Matter of Ross*, 119 A.D.2d 857 (3d Dept. 1986). In fact, some of these couriers enjoyed the power to delegate assignments, negotiate pay rates, or make delivery arrangements directly with customers, unlike Postmates' workers. *See, e.g.*, *Matter of Fox*, 119 A.D.2d 868, 869 (3d Dept. 1986), *aff'd by Rivera*. Postmates' argument that this Court has "consistently" held that workers are independent contractors because they have the "discretion" to accept or reject delivery opportunities, can work for competitors and can choose how they perform their deliveries (Respondents letter brief at 2), is contrary to this Court's binding decision in *Rivera*. Under *Rivera*, Postmates' control is not "incidental."

C. Postmates' couriers do not have the freedoms normally associated with independent contractors.

Postmates' argument that its couriers have discretion and independence is incorrect. Postmates limits the freedom of its couriers to set their own terms of service by, for example, determining the customer cost and courier pay for each delivery, by instituting a "blind" dispatch system where a courier does not know the details of a delivery until after acceptance, and by tracking deliveries in real time for its customers. Postmates also has the power to regulate its couriers' professional behavior, i.e. by reviewing customer complaints and terminating couriers for bad performance reviews. Customers essentially act as Postmates' agents in supervising its couriers' performance. *See, e.g., In re Nurse Care Registry, Inc.*, 154 A.D.2d 804, 805 (3d Dept. 1989) (finding home care nurses were employees where clients to whom the workers were referred acted as the employer's "agents ... for the purpose of supervising the [nurses'] daily work"). *See also In re Claim of Furno*, 102 A.D.2d 937 (3d Dept. 1984).

Postmates provides an estimated time of delivery – within approximately one hour from when the order was placed – and requires its couriers to commit to a mode of transportation. If an order is not delivered within this time, customers will likely review couriers negatively. Negative ratings and reviews, in turn, can result in termination. Through the threat of negative ratings, Postmates does effectively enforce deadlines. This element of control over their workers indicates an employment relationship. *See In re Kelly*, 28 A.D.3d at 1044.

Further, Postmates offers what can only be deemed as an adhesion contract to its couriers, despite being titled an independent contractor agreement. Normally, independent contractors have the power to negotiate a contract with employers. *See*, *In re Farley*, 131 A.D.3d 1295, 1296 (3d Dept. 2015); *In re Nance*, 117 A.D.3d 1294, 1295 (3d Dept. 2014). Postmates' couriers are not offered the opportunity to negotiate the terms of the agreement. Therefore, even though Postmates' couriers execute an independent contractor agreement, this is "not [a] dispositive" factor, particularly where, as here, the employer has control over their workers. *Carlson v. American Int'l Group, Inc.* 30 N.Y.3d 288, 301 (2017). If anything, the lack of bargaining power over the terms of the agreement highlights the fact that Postmates couriers are not independent contractors.

D. Postmates' couriers perform an integral function of Postmates' business.

Finally, the fact that a worker is engaged in an employer's primary business supports a finding of employee status. *See*, *e.g.*, *Professional Career Center, Inc. v. Commissioner of Labor*, 105 A.D.3d 1219, 1219 (3d Dept. 2013). Here, the Appeal Board describes Postmates' core function as "providing on-demand pickup and delivery services to consumers who place orders from local restaurants or stores." *In the Matter of Vega*, No. 588564 (Unemployment Ins. Appeal Bd. October 11, 2016). Postmates' couriers are an integral part of Postmates' delivery business.

Although Postmates attempts to characterize its business as solely a technology business, and not a delivery business, it is obvious that Postmates could not function without delivery workers. Its customers pay for the delivery service provided by its couriers, not technology. This factor clearly indicates the existence of an employer-employee relationship. *See, e.g., Matter of Charles A. Field Delivery Serv. (Roberts)*, 66 N.Y.2d 516, 517 (1985) (finding that delivery drivers who work for a delivery service business and who also maintain some flexibility in their working conditions, were employees).

CONCLUSION

For all of the aforementioned reasons, the Appeal Board's decision that Postmates couriers are employees was supported by substantial evidence. Therefore, this Court should reverse the Third Department and uphold the Appeal Board's decision in *In the Matter of Vega*, No. 588564 (Unemployment Ins. Appeal Bd. October 11, 2016).

Dated: Brooklyn, NY
January 10, 2020

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 2 NYCRR §500.13(c) that the foregoing brief was prepared on a computer using Microsoft Word. A spaced typeface was used as follows:

Name of typeface: Times New Roman

Point size: 14

Footnote point size: 12

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the corporate disclosure statement, table of contents, table of authorities, statements of interest, signature blocks and the printing specification statements is 6,685.

Dated: January 10, 2020

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